



September 25, 2002

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2002-5395

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 169374.

The Texas Department of Criminal Justice (the "department") received a request on June 26, 2002 for all documentation from a named individual's EEO complaint on or about December 21, 2001 from the Garza West unit. You advise that three responsive complaints exist, and you have provided documentation showing that the department sent a letter to the requestor on June 28 requesting clarification of the request. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). In a response received by the department on July 16, the requestor clarified that she was seeking copies of all three of the complaints. Based on our review of the information that has been submitted to us, the department had until July 29, 2002 to seek an opinion from us regarding any claim that the requested information was excepted from disclosure. *See* Open Records Decision No. 663 (1999) (providing for tolling of ten business day deadline for requesting attorney general decision while governmental body awaits clarification). Since the department claimed that some of the requested information was excepted from disclosure under sections 552.101 and 552.107 on July 23, 2002, we conclude that the department timely complied with the procedural requirements of section 552.301 of the Government Code in requesting a decision from our office regarding the submitted information. *See* Gov't Code § 552.301(b) (providing that governmental body must ask attorney general for decision as

to whether requested information must be disclosed not later than tenth business day after date of receiving written request). You advise that you are releasing some of the requested information. We have considered the exceptions you claim for the submitted information, and have reviewed the information.

We first note that the submitted information consists of a completed investigation. Section 552.022(a)(1) of the Government Code thus provides that this information is not excepted from required disclosure under the Public Information Act ("the Act"), except as provided by section 552.108, or unless the information is expressly confidential under other law. You assert the attorney-client privilege under section 552.107 of the Government Code. Section 552.107 is a discretionary exception under the Act that is intended to protect only the interests of the governmental body, and does not constitute "other law" for purposes of section 552.022. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 522 at 4 (1989) (discretionary exceptions in general).

The attorney-client privilege also is found, however, in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will determine whether the information at issue is confidential under rule 503.

Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on our review of your arguments and the submitted documents, we conclude that you have demonstrated that the interoffice communications dated January 31, 2002 and February 5, 2002 are encompassed by the attorney-client privilege and, therefore, may be withheld from disclosure pursuant to rule 503 of the Texas Rules of Evidence.

You also claim that some of the submitted information is excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common-law right to privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, *and* (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

On the other hand, a public employee's job performance does not generally constitute his or her private affairs. Open Records Decision No. 470 (1987). The public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986). *See also* Open Records Decision Nos. 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint is not protected under either constitutional or common-law right of privacy). After reviewing the submitted information, we conclude that

none of it constitutes private information, and therefore, the department may not withhold any information under section 552.101 and common-law privacy.

We note that some of the submitted information is subject to section 552.117(3). Section 552.117(3) excepts from required public disclosure the home addresses, telephone numbers, social security numbers, and information revealing whether a department employee has family members regardless of whether or not the employee complies with section 552.024. Gov't Code § 552.117(3). To the extent the individuals whose personal information is at issue are currently employed by the department, their personal information must be withheld. With respect to any individuals who are no longer employed by the department, section 552.117(3) does not apply to their personal information, and it may not be withheld under this exception.

For any such former employees, however, section 552.117(1) might apply to except their information from public disclosure. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, to the extent any former employees whose personal information is at issue elected under section 552.024, prior to the request, to keep this information confidential, you must withhold it under section 552.117(1) of the Government Code. You may not withhold this information under section 552.117 for any former employees to the extent they have not made timely elections under section 552.024. We have marked the information that you must withhold if either of these provisions of section 552.117 applies.

Any social security numbers not excepted under section 552.117 may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, you should ensure that they were not obtained or are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. We note that the submitted information contains the social security number of the requestor. Section 552.023 states that a person or a person's authorized representative has a special right of access to information that relates to the person

and that is protected from disclosure by laws intended to protect the person's privacy interest. Therefore, the department must release the requestor's social security number to her.¹

In summary, you may withhold the interoffice communications dated January 31, 2002 and February 5, 2002 pursuant to rule 503 of the Texas Rules of Evidence. You must withhold the marked personal information under section 552.117(3) to the extent the individuals whose information is at issue are current department employees. For any individuals who are former department employees, you must withhold this information under section 552.117(1) to the extent the individuals made timely elections pursuant to section 552.024. Any remaining social security numbers may be confidential under section 552.101 and the federal Social Security Act. The balance of the requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

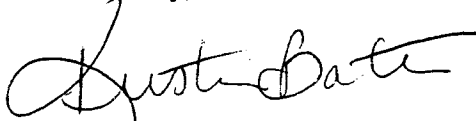
¹ Because the requestor's social security number may be confidential with respect to the general public, if the department receives a future request for this information from an individual other than the requestor, the department should again seek a decision from this office.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristen Bates".

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 169374

Enc. Submitted documents

c: Ms. Irma Rodriguez
1204 East Houston #4C
Beeville, Texas 78102
(w/o enclosures)